U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 June 2005

BALCA Case No.: 2004-INA-00305
ETA Case No.: P2003-NJ-02495640

In the Matter of:

ANACONDA CONSTRUCTION CO.,
Employer,

on behalf of

HELIO DE PAULA,
Alien.

Appearance: Cassandre C. Lamarre, Esquire
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER[1]

PER CURIAM. This case arises out of an application for labor certification[2] on behalf of Helio De Paula (hereinafter "the Alien") filed by the Anaconda Construction Co. (hereinafter "the Employer") for the position of "stone mason." The Certifying Officer (hereinafter "CO") denied

[1] Citations to the Appeal File are abbreviated as "AF."

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

the application and this appeal ensued.

STATEMENT OF THE CASE

The Employer filed the application for labor certification on July 10, 2001 (AF 18-19). The position was listed in the application as "stone mason." The Employer described the job duties of a stonemason as follows:

> Lays builkding [sic] materials such as stone for commercial and residential development projects. Pours, spreads and finishes all stone repairs and builds foundations, walls, sidewalks, porches, steps, stairways, fireplaces, BBQ pits, arches, abutments, and sewers. Cuts stone according to written specifications and shapes them preparatory to setting, using chisel, hammer, grinder, power saw, aligns stone with plumbing and creates geometric patterns. Spreads mortar over stone & sets them in place by hand or by crane. Cleans surface using muriatic acid and brushes. Supervises 1 mason helper.

(AF 19). The position required three years of experience in the job offered. (AF 18-19). In addition, the Employer sought Reduction in Recruitment (hereinafter "RIR") processing.

On September 30, 2003, the CO issued a Notice of Findings (hereinafter "NOF") indicating her intent to deny certification pursuant to 20 C.F.R. § 656.3, and denying RIR processing. (AF 29). The September 30, 2003 NOF contains a large, handwritten "X" across the face of the document, along with the handwritten notation: "replaced." (AF 30).

On October 8, 2003, the CO then issued a replacement NOF (hereinafter "NOF2")[3] in which she denied labor certification pursuant to 20 C.F.R. § 656.3, which defines "employment" as permanent, full-time work by employee for an employer other than oneself, and 20 C.F.R. § 656.20(c)(8), which requires that the job opportunity is clearly open to any qualified U.S. worker. (AF 39-40). The CO initially noted that the Employer had nine pending labor

[3] At the top of the October 8, 2003 NOF, the CO provided the following statement: "This Notice of Findings (NOF) replaces the NOF issued September 30, 2003."

certification applications before her office. The CO further noted that the Employer had two applications pending before the New Jersey State Office. The CO then advised the Employer that there was no listing for the Employer's company name or Federal Employment Identification Number (hereinafter "FEIN") in the New Jersey Unemployment Insurance computer system. Thus, the CO instructed the Employer to "document how you can guarantee permanent full-time employment for nine (9) [] additional workers and that an employer/employee relationship exists." (AF 39). Moreover, the CO asked the Employer to explain why the Alien in the instant action is also the named individual in one of the two cases pending before the New Jersey State Office.

The CO also directed the Employer to document "how long you have been in business, the location(s) of your company, the complete starting and ending dates at each location, and what kind(s) of construction you specialize in." (AF 39). The CO requested information regarding the number of workers the Employer employed from 2001 to the present, their names, job duties, and their status as full- or part-time employees or non-employees. The Employer was also directed to submit copies of the employees' W-2 or 1099-MISC forms for the years 2001 and 2002, along with the company's Federal income tax returns for 2001 and 2002. The CO further advised that if the Employer indicates it has employees, it must document why there is no listing for the company in the State Unemployment Insurance system; and, if the company is listed, the CO instructed the Employer to furnish the corresponding name and number. (AF 39).

The CO then directed the Employer to submit copies of work contracts dating back to 2001 "in order to document that full-time permanent employment can be guaranteed for [the] alien as well as [the] other stonemasons." (AF 39). Finally, the CO instructed the Employer to "document [a] willingness to advertise," advising that a local Job Service Office would contact the Employer regarding recruitment. The CO denied the Employer's request for RIR processing.

In rebuttal, the Employer submitted a cover letter from the owner, Carlos Ferreira, Jr. indicating that he "do[es] not know why [the FEIN] number is not registered" in the New Jersey computer system; Mr. Ferreira promised to "check in to that." (AF 87). The Employer also explained that the company has been in business since 1998, is located "all over [New Jersey],"

and "specializes in Interior Trim, Carpentry Frame Work, Masonry Work & Clean Up." The Employer also attached a list of employees employed since 2001, a list of their duties, and their W-2 forms. (AF 46-85). The Employer also submitted its Federal tax returns from 2001 and 2002, (AF 67-76), along with "other documentation showing my company is fully running and up to date." (AF 87). The "other documentation" included a copy of the company's business checking account statement, IRS identification numbers, and company insurance records. Finally, the Employer submitted three project invoices (two undated; one dated October, 2003). (AF 78-84).

On December 17, 2003, the CO issued a third Notice of Findings (hereafter "NOF3"). (AF 88-90). Upon review of the Employer's rebuttal documentation, the CO noted that in 2003 the Employer employed 11 individuals, 3 of whom are stonemasons and 2 of whom are truss carpenters. In 2002, the Employer employed 14 individuals, including 5 stonemasons and 2 truss carpenters. In 2001, the Employer employed 10 individuals, with 1 stonemason and 1 truss carpenter. (AF 65). The CO then questioned a number of inconsistencies within the Employer's documentation.

Specifically, the CO noted that of the nine aliens for which the Employer submitted labor certification applications, the three stonemasons include Joao Figueiredo, Sidnei Anderson, and Helio De Paula (the Alien). According to the CO, another alien, Marcelo Carvalho, for whom an application has been submitted for the position of "truss carpenter," was also listed on the Employer's rebuttal employee list as a "stonemason" for 2002 and 2003. The CO also noted that "Sidnei Anderson is apparently the same person as Anderson Borges on your list," and that Joao Figueiredo's name was misspelled on the Employer's list of employees as "Figueiedo." Finally, the CO pointed out that the Alien, Helio De Paula, is not on the Employer's list of employees, while item 15c of the ETA 750A form was amended to show that Helio De Paula has been working for the Employer since February of 2003. (AF 89).

The CO then stated that "[s]ince your workers appear to be employees and you appear to have made deductions for 'NJSTUI/DI' for 2001 and 2002 (box 14 on the W-2 forms), you must further document why there is no record of your company in the State UI system." (AF 89). The

CO explained: "The lack of a record may indicate that you do not have employees." Thus, the CO provided the Employer with an opportunity to provide documentation in the form of an NJ-927 Employer's Quarterly Report and a WR-30 Employer Report of Wages Paid for all quarters of 2001, 2001 and 2003. The CO noted then that if the Employer did not file these reports, it must "fully explain why," because "[f]ailure to do so is a violation of 20 C.F.R. [§] 656.20(c), which states that employer's job opportunity terms, conditions and occupational environment shall not be contrary to Federal or State law." (AF 88-89).

Noting that the NOF2 asked the Employer to furnish copies of service contracts, the CO explained that the invoices submitted instead "do not support permanent, full-time employment" for the three stonemasons listed as employees in the Employer's rebuttal documentation (Antonio Teixeira, Joao Figueiredo, and Marcelo Carvalho). The CO further stated that "2 of the invoices (Gomes and Allied Construction) are not dated." In short, the CO concluded that despite references to sidewalks, fireplaces, and arches, the invoices do not make clear how much, if any, of the work for each project involved the use of the three listed stonemasons. (AF 88). Thus, the CO instructed the Employer to "further document how many stonemasons are currently employed, their names and their specific duties." (AF 88). Moreover, the Employer was directed to include the names of those not currently employed by the Employer, but for whom the Employer has filed labor certification applications. Once again, the CO instructed the Employer to submit "contracts, and any other documentation, that support permanent full-time employment for" those individuals, specifying the duties each individual performs. Finally, the CO instructed the Employer to initial and date any additions made to items 15b and c on the ETA 750B form.

In response, the Employer supplied a letter dated January 14, 2004 explaining that it does not maintain "contracts" as requested by the CO in the NOF2 and NOF3, and that it does not typically keep an employee list. (AF 100). Instead, the Employer claimed that its invoices reflect the "bulk work" performed for "ongoing jobs" and do not specify which type of work will be performed or by whom. Moreover, the Employer insisted that it properly documented that it can guarantee permanent, full-time employment for nine workers when it submitted the company tax documents, stating: "I have the money to pay all these guys." (AF 100). The Employer also

provided a narrative of the work it performs, insisting that its work is "100% real." (AF 100). In response to the CO's instruction to submit specific tax forms in order to document that a *bona fide*, permanent, full-time position exists, the Employer explained that it is being audited by the IRS, and it never registered for unemployment insurance "because first I am sole proit. [sic] and second my guys didn't have real socials." (AF 99). In short, the Employer failed to file the forms requested by the CO in the NOF3 and did not submit a single contract or any other documentation explaining the amount of stonemasonry work performed as requested in the NOF3.

On March 9, 2004, the CO issued a Final Determination (hereinafter "FD") denying labor certification. (AF 101-102). Citing to 20 C.F.R. §§ 656.3 and 656.20(c)(8), the CO noted that the NOF3 "did not question [the Employer's] ability to guarantee [its] workers' wages," but instead requested documentation establishing the existence of a *bona fide* permanent, full-time position which is open to qualified U.S. workers. (AF 101). More specifically, the CO reminded the Employer that the NOF3 noted that the invoices previously submitted were insufficient, and then stated that the most recent rebuttal materials include "no additional contracts, bills or invoices." (AF 101).

Furthermore, the CO noted that there remained no record of the company in the New Jersey Unemployment Insurance system, and that the Employer failed to furnish copies of the NJ-927 Employer's Quarterly Report and the W-30 Employer Report of Wages Paid as instructed. The CO had directed the Employer to furnish these documents in order to show that the workers for whom the Employer submitted W-2's are actually employees. Accordingly, the CO concluded that because "[a]ll employers subject to the provisions of the Unemployment Insurance Law are required to file these forms," "[f]ailure to do so is a violation of 20 C.F.R. § 656.20(c)," which states that an employer's job opportunity terms, conditions, and occupational environment shall not be contrary to State or Federal law. (AF 101).

By letter dated April 8, 2004, the Employer filed a request for review of the CO's Final Determination before the Board of Alien Labor Certification Appeals (hereinafter "the Board"). (AF 111). The Employer claims that it is not required to register for Unemployment Insurance

because it is a sole proprietorship, and its employees are not legal. In addition, the Employer argues that its request for the CO to further notify the Employer and to send specific examples of proper documentation if the CO found the invoices unacceptable was "simpl[y] dismissed." The Employer again insists that its tax forms indicate an ability "to guarantee the prevailing wage and permanent full-time employment." (AF 111). The case was docketed with the Board on July 9, 2004.

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997). Here, the CO explicitly directed the Employer to submit service contracts documenting the existence of a *bona fide* job opportunity and its ability to provide permanent, full-time employment for a stonemason. In response, the Employer submitted invoices for three projects without explanation of how much of the work was performed by stonemasons, along with the company's tax returns. In the NOF3, the CO again directed the Employer to submit, "contracts, and any other documentation, that support permanent full-time employment" for the Alien as a stonemason, noting that the previously submitted invoices were insufficient to carry the Employer's burden. In response, the Employer submitted no additional documentation. Instead, the Employer provided a statement explaining that it does not maintain or utilize detailed service contracts and insisting that it can adequately pay the prevailing wages.

As the CO explained, the Employer was required to submit documentation establishing that a *bona fide* opportunity exists, not merely whether it can adequately pay its employees' wages. In other words, the Employer had to sufficiently prove that the position of stonemason is a true, permanent and full-time job at Anaconda Construction; not simply a position that exists on paper.[4] Thus, the company's tax returns proved insufficient to meet the Employer's burden. Accordingly, the CO provided the Employer with yet another opportunity to document a *bona fide* job opportunity. The Employer again failed to provide any such documentation other than undated invoices that include superficial descriptions of the work performed and the cost of that

[4] *See Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

work. In other words, the invoices submitted did not explain how much, if any, of the company's construction work is performed by stonemasons or whether "stonemason" is a permanent, full-time position at Anaconda Construction. If an employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Moreover, the Employer did not supply sufficient explanation for its failure to submit an NJ-927 Employer's Quarterly Report or a W-30 Employer Report of Wages Paid to establish that it in fact has employees as instructed by the CO. If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Moreover, if the CO's request for documentation having a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, the Employer provided nothing more than a statement regarding his ability to pay wages and a guarantee that the position of stonemason exists, along with an explanation for why it cannot produce the abovementioned forms which included an admission that its employees are "not legal" and do not have social security numbers.

Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Thus, even though the Employer insists that it does not execute detailed service contracts, the Employer was required to produce sufficient documentation establishing that a permanent, full-time stonemason position exists, such as a more detailed invoice or billing summary setting forth the type of or amount of work performed by a stonemason for a particular project. The Employer provided none. Furthermore, the Employer's admission that it employs illegal aliens without social security numbers does not constitute a reasonable explanation for violating 20 C.F.R. § 656.20(c)(7), which states that an employer's job opportunity terms, conditions and occupational environment shall not be contrary to State or Federal law. Thus, the Employer has not met its burden.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.